Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-1446.

CHARGER INVESTMENTS, INC. D/B/A
THE SQUIRE, ET AL.,
APPELLANTS,

v.

GEORGE P. CORBETT, CHIEF OF POLICE,
CITY OF REVERE, ET AL.,
APPELLEES.

ON APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS,
SUFFOLK COUNTY.

Appellants' Brief in Opposition to Appellees' Motion to Dismiss.

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Appellants' Brief in Opposition to Appellees' Motion to Dismiss.

The appellants brought this appeal, pursuant to 28 U.S.C. § 1257 (2), from the final judgment after rescript of the Superior Court for Suffolk County of the Commonwealth of Massachusetts affirming the validity of art. III of c. 13 of the city of Revere Revised Ordinances. The appellants contend that the ordinance is repugnant to the First and Fourteenth Amendments and unauthorized by the Twenty-first Amendment to the United States Constitution.

The appellees have moved this Court to dismiss the instant appeal on the grounds that such appeal does not present a substantial federal question and that the final judgment appealed from rests on an adequate non-federal basis. Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, the appellants submit this brief in opposition to the appellees' motion to dismiss.

Argument.

1. The State Law Question Decided Below Is Not Adequate to Sustain the Final Judgment.

The state law question decided below was that the Revere Ordinance, *supra,* "is within the powers granted to the City by the Home Rule Amendment, Mass. Const. amend. art. 89, § 6, and the Home Rule Procedures Act, G.L. c. 43B, § 13, and is not on its face inconsistent with our [i.e. Massachusetts] Constitution or laws" (A. 38).[1] The appellants acknowledge that this question is not within this Court's appellate jurisdiction. However, in suggesting that as a result of this ruling, the final judgment rests on an adequate non-federal basis, the appellees misapply the doctrine of the independent adequate state ground. That doctrine is founded upon the necessity of avoiding advisory opinions, *Murdock* v. *Memphis,* 20 Wall (87 U.S.) 590 (1875); *Herb* v. *Pitcairn,* 324 U.S. 117, 125-126 (1945), and applies only when the state ground is "broad enough, in itself, to support the final judgment, without reference to the federal question." *Eustis* v. *Bolles,* 150 U.S. 361, 369 (1893). When, however, as here, a municipal ordinance is challenged both as unauthorized under state law *and* as repugnant to the United States Constitution, this Court has appellate jurisdiction over the case even though the former question is unreviewable. Indeed, such was the situation presented in each of the cases cited by the appellees in support of their contention that jurisdiction is lacking in the instant appeal. *Reinman* v. *Little Rock,* 237 U.S. 171 (1915); *Thomas Cusack Company* v. *Chicago,* 242 U.S. 526 (1917); *Hadacheck* v. *Sebastion,* 239 U.S. 394 (1915); *Atlantic Coast Line Railroad Company* v. *Goldsboro, North Carolina,* 232 U.S. 548 (1914).

[1] Appendix to Appellants' Jurisdictional Statement, 38, hereinafter referenced as (A.).

2. The Power of the City of Revere to Promulgate the Instant Ordinance Presents a Federal Question.

In light of the above, the appellees' argument must be taken to mean not that the final judgment in the instant appeal rests on an adequate state ground but that *California* v. *LaRue,* 409 U.S. 109 (1972), settles all federal questions in the case and that the power of the city of Revere to pass the ordinance at issue here is a question subject exclusively to local law, unreviewable in this Court. This argument is without merit. The power of the city of Revere to enact the instant ordinance presents questions arising under the First and Twenty-first Amendments which cannot be disposed of by consideration of local law alone, and which were not decided by *LaRue.*

In *LaRue,* this Court recognized that at least some of the performances proscribed by the regulations at issue there were in themselves within the protection of the First Amendment. *California* v. *LaRue, supra,* 409 U.S. at 116, 118. But in the "context of licensing bars and nightclubs to sell liquor by the drink" it was stated that the Twenty-first Amendment confers "something more than the normal state authority over public health, welfare, and morals." *Id.* at 114. On that basis it was held that the California Department of Alcoholic Beverage Control, *"the state*

agency that is itself the repository of the State's power under the Twenty-first Amendment,'' id. at 116, acted within constitutional limits in promulgating the contested regulations (emphasis supplied).

In contrast, in the instant case the Supreme Judicial Court for the Commonwealth of Massachusetts specifically found that the Revere City Council had no authority to grant, modify, suspend, revoke or cancel a local liquor license (A. 44-45). Accordingly, in sustaining Revere's power to enact the ordinance despite the city's lack of licensing authority that Court did not rely upon the powers conferred on the states by the Twenty-first Amendment but characterized the authority behind the ordinance in terms of the normal police power of a city to deal with ''the maintenance of the peace and good order'' (A. 45).

This Court, in its recent decision in *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975), gave recognition both to the possibility that the power of a city to enact a *LaRue* type ordinance does not exist apart from an expressed delegation of state authority over liquor licenses and to the fact that the issue posed thereby involves a federal question concerning the scope of and interaction between the First Amendment and Twenty-first Amendment. Thus, as the Court noted:

> ''In *LaRue,* however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a state could therefore ban such dancing *as a part of its liquor license program''* (emphasis supplied). 422 U.S. at 932-933.
>
> ''Even if we may assume that the State of New York has delegated its authority under the Twenty-first Amendment to towns such as North Hempstead, and that the ordinance would therefore be constitutionally valid under *LaRue, supra,* if limited to places dispensing alcoholic beverages, the ordinance in this case is not so limited.'' 422 U.S. at 933-934.

Hence the issue of the power of the city of Revere to promulgate the instant ordinance cannot be disposed of on state law grounds alone but presents the federal question of whether such ordinance constitutes a permissible exercise of a state's power under the Twenty-first Amendment.

3. The Federal Question Is Substantial.

In their motion to dismiss, the appellees argue that since the Revere ordinance is ''restricted to places where alcoholic beverages are sold,'' questions of its constitutionality were adjudicated in *California* v. *LaRue, supra,* and that therefore no substantial federal question is presented in the instant appeal (appellees' motion to dismiss 4).

LaRue's sanction of regulations of this type, however, is not so broad as the appellees' statement suggests. Lower federal courts have read *LaRue* as leaving First Amendment protection intact for semi-nude barroom performances that do not partake of the ''gross sexuality'' that characterized the entertainment held there to have been validly proscribed. *Clark* v. *Fremont, Nebraska,* 377 F. Supp. 327 (D. Neb. 1974); *Escheat, Inc.* v. *Pierstorff,* 354 F. Supp. 1120 (W.D. Wis. 1973). Thus *Clark* v. *Fremont, supra,* held unconstitutional that part of an ordinance which proscribed the showing of uncovered female breasts, the court concluding that topless dancing *per se* and body painting were not within the range of activities subject to unrestricted regulation under *LaRue.* 377 F. Supp. at 342. Section 13-26 of the Revere ordinance (A. 23-24) on its face also forbids topless dancing and is thus similarly overbroad. See also

Escheat, Inc. v. *Pierstorff, supra,* where the court concluded that "some shows which fall somewhere between Mary Poppins, on the one hand, and 'Bacchanalian revelries,' on the other, even when performed in a bar, continue to be entitled to first amendment protection" (footnote omitted). 354 F. Supp. at 1126.

More importantly, there are in the instant case *no* findings by the state legislature, or municipal or state liquor authority, as there were before this Court in *LaRue,* that the conjunction of the performances proscribed here and the dispensation of liquor by the drink resulted in an increased number of assaults, indecent exposures, attempted rapes or other anti-social behavior. Under these circumstances a substantial question is presented as to whether the Revere City Council was warranted in adopting an across-the-board prophylactic solution of the kind justified by the different circumstances presented in *LaRue.* See *Peto* v. *Cook,* 364 F. Supp. 1, 3 (S.D. Ohio, 1973), *aff'd mem. sub nom Guggenheim* v. *Peto,* 415 U.S. 943 (1974); *Salem Inn, Inc.* v. *Frank,* 381 F. Supp. 859, 863-864 (E.D. N.Y. 1974), *aff'd* 522 F. 2d 1045 (2d Cir. 1975). Indeed, in view of the lack of legal authority in the Revere City Council to license liquor establishments, its enactment of the ordinance now under review seems censorious and political, and not regulatory.

For the foregoing reasons the appellants submit that the questions presented by this appeal are not bereft of substantiality by reason of prior decisions of this Court, *Zucht* v. *King,* 260 U.S. 174 (192[illegible] so as to warrant dismissal of this appeal.

Conclusion.

For the reasons stated the Court should note probable jurisdiction in this case.

Respectfully submitted,

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